Nos. 83-997 and 83-1325

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTIONS PRESENTED

1. Whether Trans World Airlines (TWA) violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly-situated pilots were allowed to do so.

2. Whether TWA's violation of the Age Discrimination in Employment Act was willful.

3. Whether unions are liable for back pay under the Age Discrimination in Employment Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39)[1] is reported at 713 F.2d 940. The opinion of the district court (Pet. App. A44-A61) is reported at 547 F. Supp. 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1983, and rehearing was denied on November 10, 1983 (Pet. App. A41-A42). The petition for a writ of certiorari in No. 83-997 was filed on December 16, 1983, and granted on February 27, 1984; the cross-petition (No.

[1] "Pet. App." references are to the Appendix to the Petition in No. 83-997.

83-1325) was filed on February 8, 1984, and granted on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a), (c), (f)(1), (2) and 12(a) of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. 623(a), (c), (f)(1), (2) and 631(a); and Section 121.383(c) of the Federal Aviation Administration Regulations (14 C.F.R.), are set forth at 83-997 Pet. 2-5. Section 7(c)(1) and (e)(1) of the ADEA (29 U.S.C. 626(c)(1) and (e)(1)); Sections 16(b), (c) and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. 216(b), (c) and 217); and Sections 6(a), 10(a) and 11 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 255(a), 259(a) and 260) are set forth in a statutory appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case began on November 14, 1978, when Harold Thurston and Christopher Clark brought suit against Trans World Airlines, Inc. (TWA) and the Air Line Pilots Association (ALPA), the pilots' bargaining representative, challenging their involuntary retirement at age 60 as a violation of the ADEA.[2] The Equal Employment Opportunity Commission (EEOC) intervened as plaintiff on behalf of other involuntarily retired TWA captains and other crew members adversely affected by TWA's practice of imposing more restrictive transfer rules on those seeking transfers because of their age than on those seeking transfers for other reasons. The district court granted summary judgment to TWA and ALPA (Pet. App. A57-A61). The court of appeals reversed, finding that the district court had ignored direct evidence of discrimination, and entered judgment for plaintiffs (Pet. App. A24).[3]

[2] Thurston, Clark and a third plaintiff, Clifton Parkhill, were captains for TWA who sought to continue working by transferring to flight engineer positions. Such a transfer was necessary to their continued employment on the flight deck because of an FAA regulation requiring captains, but not flight engineers, to be under 60 years of age (14 C.F.R. 121.383(c)).

A. Background Facts[4]

TWA, a commercial airline certified by the Civil Aeronautics Board and operating under Part 121 of the Federal Aviation Regulations (14 C.F.R. Pt. 121), employs approximately 3000 pilots in four cockpit positions (C.A. App. 930, 991-992).[5] The captain commands the aircraft and is responsible for all phases of its operation (C.A. App. 250, 339). The first officer assists or relieves the captain as co-pilot (*ibid.*). The flight engineer (called second officer on some airlines) is primarily responsible for monitoring the mechanical, electrical, and electronic functioning of the aircraft (C.A. App. 250, 340). On certain long-distance flights there is a fourth crew member, an International Relief Officer (IRO), who acts as third in command and who performs both flight engineer and first officer duties, except aircraft takeoff and landing (C.A. App. 330, 339-340, 350-352).

[3] In a separate action, ALPA brought suit against TWA, charging that the company's practice of allowing anyone to serve in the cockpit beyond the age of 60 was a unilateral change in the pilots' rates of pay, rules, or working conditions in violation of Section 6 of the Railway Labor Act (RLA), 45 U.S.C. 156. ALPA also sought a declaratory judgment that the ADEA amendments did not require any changes in TWA's practice of mandatorily retiring all pilots at age 60 (C.A. App. 108-113). The district court dismissed ALPA's suit on summary judgment (Pet. App. A50-A54) and the court of appeals affirmed (Pet. App. A13-A21). ALPA has not sought review of that dismissal in this Court.

[4] The parties agreed in the court below that the case was appropriate for disposition on summary judgment as to liability (Pet. App. A5). The facts summarized derive principally from the affidavits or deposition testimony of TWA officials and from TWA's answers to interrogatories.

[5] The TWA-ALPA collective bargaining agreement refers to all cockpit, or flight deck, positions as "pilot". We follow that usage herein, except where the context indicates otherwise.

A regulation promulgated by the Federal Aviation Administration (FAA) prohibits anyone from serving as a pilot on a commercial carrier beyond age 60 (FAA Age 60 Rule).[6] Captains, first officers and IROs are considered "pilots" subject to this FAA regulation; flight engineers are not (C.A. App. 543-548, 1006, 1026).

The retirement plan for all pilots negotiated between TWA and ALPA, in effect at the time this dispute arose,[7] provided that the "normal retirement date is the [pilot's] 60th birthday" and that "[pilots] must retire by their normal retirement date unless written approval by the company is granted for continuance in employment" (C.A. App. 401, 418). Those provisions have been in the plan for many years, and until 1978 TWA employed no one over age 60 as a pilot on its airplanes. The same retirement provision appears in the 1982 plan negotiated between TWA and ALPA. Pet. App. A8.

B. The Development and Operation of TWA's Age 60 Policy

Effective April 6, 1978, the ADEA was amended to prohibit the involuntary retirement of covered employees. Section 2(a), Pub. L. No. 95-256, 92 Stat. 189. For several months thereafter, TWA continued to retire all pilots at age 60. However, on July 19, 1978, the company announced a new policy in a letter from David Crombie, TWA Senior Vice President for Administration, to ALPA that stated that TWA was legally obligated to employ all pilots as flight engineers beyond age 60 and to offer to

[6] The regulation states:

"No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." See 14 C.F.R. 121.383(c).

[7] The retirement plan, like the collective bargaining agreement between ALPA and TWA ("Working Agreement"), became effective October 1, 1977 (C.A. App. 401, 403-404).

reinstate as flight engineers all pilots mandatorily retired after April 6, 1978 (C.A. App. 426-428).[8] The text of the letter made clear that TWA contemplated no "bidding" requirement for captains who wished to be recalled to or to continue employment as flight engineers beyond the age of 60.[9]

The Crombie letter also indicated that no change would be made until ALPA presented its views (C.A. App. 428).

[8] Crombie's position was based on his view of the requirements of the ADEA, and the risk of "the double damage penalty for a willful violation" (Hilly Deposition, July 7, 1980, at 72). He had received legal advice on this matter (*id.* at 104).

[9] The letter from Crombie to the Chairman of the TWA Master Executive Council (TWA-MEC) of ALPA stated in pertinent part (C.A. App. 426-427):

> [T]he Company believes the 1978 Amendments, the pertinent FARs [Federal Aviation Regulations], the Working Agreement and the Railway Labor Act require that the following steps be taken by it and the Association:
>
> 1. Advice be given to all pilots and flight engineers that they will not be compelled to retire solely because they have reached age 60, the mandatory retirement age under their pension plans.
>
> 2. Advice be given to all pilots and flight engineers who have retired upon reaching age 60 after April 6, 1978, that they are eligible for reemployment by the Company as flight engineers without loss of seniority provided they advise the Company of their intention to seek reemployment promptly and thereafter report for work without undue delay.

Consistent with Crombie's letter, the Chairman of the TWA-MEC had previously informed Council members on June 21, 1978 (C.A. App. 1027-1040):

> TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978 will be offered opportunity to return as flight engineer. Captains and first officers desiring training as flight engineer will be so qualified. All of the above is in accordance with the "Age Discrimination In Employment Act" which became effective April 6, 1978, and with our Working Agreement.

These views, communicated to TWA during the summer of 1978, showed ALPA to be completely opposed to the employment of any pilot beyond age 60, even as flight engineer (C.A. App. 1027, 1033-1037, 1041-1049, 1050-1056).

When Crombie was hospitalized shortly after the letter was dispatched, reponsibility for development of policy on the age 60 question was transferred to J. Edward Frankum, TWA's Vice President of Flight Operations. Unlike Crombie, Frankum opposed the employment of pilots beyond age 60 and did not agree with the position stated in Crombie's July 19th letter (C.A. App. 828-836, 1000-1005, 1022, 1027-1029). Frankum stated that after Crombie was hospitalized, "I, in effect disavowed [that] letter and we proceeded from there" (C.A. App. 1005A).[10]

On August 10, 1978, Frankum caused TWA to issue a brief bulletin to its personnel stating that "any cockpit crewmember who is in flight engineer status at age 60 may not be compelled to retire" (C.A. App. 425, 1006-1007). The bulletin did not indicate whether captains or first officers would be permitted to downgrade to flight engineer status, or if so, by what procedure.

After August 10, TWA offered reinstatement to the flight engineers and IROs who had been involuntarily retired between April 6 and August 10, 1978 (C.A. App. 846, 849 (Resp. 3c), 623, 630 (Resp. 13)). Five retirees

[10] Frankum's deposition testimony confirmed that he had forcefully expressed his views to Crombie (Frankum Deposition July 9, 1980, at 156-158):

Q. Did you have any [conversations with Crombie] on the subject of the age sixty legislation?
A. Of course.
Q. Can you tell us what you said in any of those discussions?
A. Yes. I told him that I didn't want to fly anybody past age sixty.
Q. Did you discuss it any further than that?
A. I told him that him and his lawyers were full of it.
Q. What else was said?
A. That sums it up.

accepted the offer and were reinstated (C.A. App. 463, 930, 997-998).[11] None of the three original plaintiffs or EEOC claimants who were forced to retire as captains during this period was offered reinstatement.[12] Flight engineers and IROs reaching their 60th birthdays after August 10, 1978, have been allowed to continue employment as flight engineers (C.A. App. 930, 937, 971). A TWA captain or first officer is mandatorily retired on his 60th birthday, however, unless he has bid on and been awarded a flight engineer vacancy with an effective date before his 60th birthday (C.A. App. 184, 186-187 (¶ 11)).[13] TWA refuses to honor a bid for a vacancy effective after a captain's 60th birthday on the ground that "[bids] can only be awarded to somebody on the seniority list and at age 60 a man goes off the seniority list" (C.A. App. 930, 974). The only pilots who go "off the seniority list", however, are captains and first officers at age 60 because, according to TWA, they are required to be retired on that date under the FAA Age 60 Rule (C.A. App. 184, 187 (¶ 13), 930, 974-980, 990, 852, 856-860 (Resp. 12)). The TWA-ALPA Working Agreement does not require extinguishing the

[11] International Relief Officers were offered reinstatement despite the fact that they are subject to the FAA Age 60 Rule, just as captains and first officers are (C.A. App. 1026).

[12] There were initially thirteen former TWA captains—three original plaintiffs and ten EEOC claimants—challenging their involuntary retirement. Three of the EEOC claimants have settled with TWA (see note 20, *infra*). Of the remaining ten captains, three became 60 before August 10, 1978. Private plaintiff H. Thurston was retired on June 11, 1978, after his request to continue employment beyond age 60 was denied by the company on May 26, 1978 (C.A. App. 903-905, 909-910, 647). EEOC claimant A.M. Lusk was retired on May 2, 1978, and TWA denied his October 1978 request to be recalled as a flight engineer (C.A. App. 576, 581-582, 592, 645-646). EEOC claimant L.D. Bobzin was retired on May 9, 1978, after his request to continue employment was denied (C.A. App. 643-644).

[13] The effective date of a vacancy is the date on which a pilot is expected to assume the new position (C.A. App. 930-932).

seniority of captains and first officers who are barred from continuing in these positions by virtue of the FAA Age 60 Rule. Rather, Section 17 of the Agreement, entitled "Seniority", simply provides that "[a]ny pilot whose services with the Company are permanently severed shall forfeit his seniority rights" (C.A. App. 250, 294 (Section 17(A)(6)).[14]

As a direct result of TWA's "effective date" bidding restriction, six of the seven captains in this litigation who turned 60 after August 10 were involuntarily retired. Two were retired after filing bids because their 60th birthdays arrived before September 1, 1978, the effective date of the first flight engineer vacancies to be announced after August 10 (C.A. App. 184, 187 (¶¶ 12-14), 468-470).[15] The four others, who reached age 60 after September 1, 1978, were nonetheless retired because no vacancies were posted subsequent to their bids which carried effective dates preceding their sixtieth birthdays.[16]

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[14] While age 60 captains unable to secure flight engineer vacancies are severed from employment, TWA, at its discretion, currently allows younger pilots extended, unpaid "personal time off." These leaves can be requested for any reason, are granted in one-month increments, and are rarely denied. In any given month, 7 to 12 pilots are on personal leave (C.A. App. 930, 962-965).

[15] TWA refused to honor the bid filed by private plaintiff C. A. Parkhill on August 15 because the September 1st vacancies fell nine days beyond the date of his 60th birthday, August 22, 1978 (C.A. App. 911, 913, 916-918). EEOC claimant R. Gowling was retired on August 27, 1978, his 60th birthday, because the September 1st vacancies fell four days thereafter (C.A. App. 576, 581-582, 592).

[16] EEOC claimant T.M. Widmayer placed a bid on November 1, 1978, and was retired on his sixtieth birthday, November 10, 1978 (C.A. App. 576, 581-582, 592). EEOC claimant A.T. Humbles filed a bid on June 5, 1979, but there was only one vacancy between that date and September 14, 1979, when Humbles turned 60, and that was awarded to a "career flight engineer" with priority bidding rights to flight engineer vacancies (C.A. App. 576, 581-582, 592, 496-499). EEOC claimant D.V. Roquemore was retired when he

After the August 10 bulletin establishing the "effective date" requirement, TWA imposed two additional restrictions on downbidding captains. Both restrictions were advocated by ALPA and adopted in 1980 (C.A. App. 1041, 1063-1069, 1074-1077).[17] The first of these requires successful captain downbidders to "fulfill their bids in a timely manner" (*ibid.*). At first, captains who bid successfully for flight engineer vacancies were allowed to fly as captains until they became 60, and were then scheduled for flight engineer training.[18] Under the

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turned 60 on August 21, 1981, because the next available vacancy after his bid carried an effective date ten days beyond his birthday.

Private plaintiff C.J. Clark was retired when he turned 60 on September 19, 1978. Clark wrote to TWA in July 1978 requesting continued employment beyond age 60 (C.A. App. 929). In a letter dated August 3, 1978, TWA responded that, for the time being, Clark would not be permitted to work as a flight engineer beyond age 60. The letter went on to state that "should our policies ultimately be such that they would have permitted you to continue to work after attaining age 60, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty" (C.A. App. 648). In light of this letter, Clark believed that he need not file a bid for a flight engineer vacancy in order to continue working in that position after his sixtieth birthday (C.A. App. 919, 922-924). If he had bid on the vacancies that became effective on September 1, 1978, Clark would have been awarded one based on his seniority relative to that of other bidders (C.A. App. 919, 925-928).

[17] ALPA also suggested other restrictions that would have adversely affected older pilots. For example, the union proposed that TWA furlough over-age-60 flight engineers before other engineers, regardless of company seniority, or that over-age-60 flight engineers be assigned a new seniority date corresponding to the date upon which they qualify as flight engineers (C.A. App. 1041, 1046-1066).

[18] For example, Ruble, who turned 60 on January 28, 1979, was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 1). Lundberg, who turned 60 on February 9, 1979, also was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 2). These and other downbidders who turned 60 in 1979 were placed on vacation status at captains' pay between their 60th birthday and the date upon which their training began (C.A. App. 930, 986-988).

amended practice, captains who have secured flight engineer bids are required to activate them immediately, even before their 60th birthdays (C.A. App. 1041, 1070-1071). The result is that most downbidding captains are trained for and assume flight engineer positions before age 60, with a concomitant loss in pay and responsibility, whereas before implementation of this rule virtually all downbidders were permitted to complete their full careers as captains. (Compare training dates and birth dates of downbidding captains in 1979 and in 1980-1981 at C.A. App. 568, 570 (Resp. 6), 574).)[19]

The second restriction further limited bidding rights. Under prior practice a successful downbidder was placed in off-duty-without-pay status after his 60th birthday if he had not then passed the written examination prepared by the FAA as a prerequisite for pilot entry into flight engineer training (C.A. App. 473-476). In January 1980, however, TWA began cancelling the bid of any captain who has not passed the flight engineer examination when reporting for training (C.A. App. 477-480). This practice, operating in conjunction with the "effective date" requirement, precipitated the retirement of three of the EEOC's original ten claimants.[20]

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[19] While TWA now immediately schedules successful downbidders for training, it has deferred training for younger pilots where the scheduled training dates cause personal hardship (C.A. App. 930, 935-936, 980-982).

[20] T. Emrich and J.L. Clark were retired after their bids were cancelled and their subsequent rebids failed for lack of vacancies carrying an effective date prior to their sixtieth birthdays (C.A. App. 872-873, 846-847, 850-851). Both have since settled with TWA, as has EEOC climant R.F. Adickes who was retired after sickness prevented him from reporting for training and his bid was cancelled.

EEOC claimant H.W. Lewis was awarded a bid effective October 31, 1979. He was originally informed that if he failed to pass the written examination before his training date, he would be placed on leave without pay until he passed it. On January 15, 1980, he received a scheduled training date and a warning that failure to pass the examination would result in cancellation of his bid. Mr. Lewis declined to take the examination or appear for training because he wished to continue to fly as captain until his 60th birthday, on November 4, 1980. His bid was therefore cancelled and his rebid, filed September 24, 1980, failed for lack of appropriate vacancies (C.A. App. 501-510, 846-847, 850-851).

C. TWA's Captain Downbidding Procedures Compared to Other Methods of Pilot Transfer

The bidding system procedure that TWA applied to the captains approaching age 60[21] is not the only method provided in the Working Agreement with ALPA to permit pilots to move from one position to another. For pilots who are compelled to vacate their positions because of non-age related reasons, the Working Agreement specifies transfer procedures that do not involve bidding and do not result in discharge if no transfer is available. The Working Agreement thus provides that a captain or first officer who is unable to maintain a first-class medical certificate, which is required for those positions by the FAA, may automatically "displace" or "bump" a less senior flight engineer, and thereby assume his position, if the medically disabled pilot can acquire the second-class medical certificates required for that position. C.A. App. 250, 302-303 (Section 19(A)(3), (A)(4)(a)). In that situation, assignment to flight engineer status is not conditioned upon the existence of a flight engineer vacancy (C.A. App. 623, 626-627 (Resp. 6)). Moreover, if the disabled pilot lacks sufficient seniority to displace, he is not discharged. Rather, he is entitled to go on unpaid

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[21] Under this system, a pilot who wishes to transfer from one "status" (position) to another, or from one "domicile" (base location) to another, files a bid for the desired vacancy. Vacancies are generally announced as they arise. Bids can be filed in advance of specific vacancy announcements ("Standing Bid") or in response to those announcements ("Telegram Bid"). C.A. App. 184, 185 (¶¶ 3-10), 250, 302-304 (Section 19(A)(5), (A)(6), (B), (C)). Vacancies are awarded to qualified bidders in order of seniority, *i.e.*, date of hire with the company. C.A. App. 184, 186 (¶ 8), 250, 294 (Section 17(A)(1), (A)(3)).

medical leave for up to five years, during which time he retains and continues to accrue seniority, and has a priority right to bid on and retain a flight engineer position in preference to any more senior pilot who is medically qualified for the captain or first officer seat. C.A. App. 250, 298-299 (Sections 18(B)), 302, 303 (Section 19(A)(4)(b)).

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reduced manpower needs may use his seniority to displace the least senior pilot in any position at his current or last former domicile, or in his current position anywhere in TWA's system. C.A. App. 250, 311-312 (Section 19(G)). Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed in furlough status, which may extend for a period of up to ten years, during which time he continues to accrue seniority for purposes of a recall (C.A. App. 861-869). Seniority governs reemployment after release due to such a reduction in force. C.A. App. 250, 294 (Section 17(A)(3)).[22]

In addition, the Working Agreement provides that a pilot who fails training to upgrade to captain or first officer is not discharged, but is instead assigned to permanent flight engineer status at his permanent domicile, whether or not a flight engineer vacancy there exists (C.A. App. 250, 265-266 (Section 6(B)(16)), 930, 941-948). Similarly, as a disciplinary measure in response to demonstrated incompetence, TWA has frequently (C.A. App. 1006, 1024-1026) downgraded a pilot to a lower position for which he is qualified, without requiring the pilot to bid for a vacancy. C.A. App. 930, 972-973, 250, 266 (Section 6(B)(17)).

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[22] As of 1982, TWA was operating under a "furlough aversion" agreement with ALPA: it reduced the hours worked by all of the pilots in its system rather than furloughing pilots rendered surplus due to operational cutbacks (C.A. App. 930, 938-940).

D. Opinions Below

On motions for summary judgment, the district court ruled that TWA and ALPA were entitled to judgment against the Thurston plaintiffs and the EEOC as a matter of law. The court held, first, that plaintiffs could not establish a prima facie case of age discrimination, under the test set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because none could show that a flight engineer vacancy existed "at the time [he] applied and [was] eligible for the job" (Pet. App. A57). The district court further held that the involuntary retirements and the downbidding requirements themselves fell within the exceptions provided by Section 4(f) of the ADEA, for the following reasons. Finding that the bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner," the court concluded that "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The retirement of unsuccessful bidders, the court further stated, was "due solely to their reaching [age 60] while in the pilot status," an age which the court characterized as "a bona fide occupational qualification for airline pilots by virtue of the FAA regulations" (*ibid.*).

The court of appeals reversed. Noting that the *McDonnell Douglas* formula is not an "inflexible rule" (Pet. App. A23), the court below rejected the district court's mechanical application of the formula. Since direct proof of discriminatory treatment is just as probative as the circumstantial proof outlined in *McDonnell Douglas*, the court ruled that a prima facie case had been established by the evidence "that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60" (Pet. App. A24).

The court of appeals also rejected TWA's and ALPA's statutory defenses under Section 4(f)(1) and (2): petitioners' actions were not immune under Section 4(f)(2) because the involuntary retirement of captains at age 60 "is in no way mandated by the negotiated seniority system" (Pet. App. A26); and the retirements were not permissible under Section 4(f)(1), because it was undisputed that age 60 was not a BFOQ for flight engineers (Pet. App. A28).

Because ALPA "actively campaigned" in favor of retiring all pilots at age 60 and opposed any attempts by TWA at partial compliance with the ADEA, the court held the union to be jointly liable (Pet. App. A32-A33). However, it refused to order ALPA to pay any monetary relief (Pet. App. A38-A39). The court did order TWA to pay liquidated damages, since the record clearly showed that the company's discriminatory acts satisfied the standard adopted by the court for willful violations—the acts were knowing, intentional, and voluntary, and taken in reckless disregard of the ADEA's proscriptions (Pet. App. A33-A34).

SUMMARY OF ARGUMENT

TWA uniformly permits pilots who are disqualified from their current positions for non-age reasons to remain employed, to continue to accrue seniority and to transfer to a position for which they are qualified as soon as it is available. The company, with ALPA's encouragement and support, nevertheless denies these privileges to pilots who are disqualified because of age. This disparity in treatment is based solely on age and is thus in direct violation of the ADEA.

Section 4(f) of the ADEA permits an employer to take adverse personnel actions to observe the terms of a bona fide seniority system or where age is a bona fide occupational qualification reasonably necessary to the performance of the job involved. Neither exception excuses TWA's decision to establish especially stringent transfer policies for pilots approaching age 60. The injury challenged here is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system. Nothing in either the FAA Age 60 Rule or the TWA-ALPA Working Agreement requires such forced retirement, or suggests that age 60 is a BFOQ for the flight engineer position. In any event, the seniority system exemption does not apply to involuntary retirements.

With respect to relief, the court below correctly determined the TWA willfully violated the Act and awarded liquidated damages pursuant to Section 7(b) of the ADEA. When an employer intentionally discriminates among its employees on the basis of their age, and knows or should know of the applicability of the ADEA, any violation of the Act is willful. This interpretation is consistent with the uniform interpretation of the language in the Portal-to-Portal Act from which the ADEA provision is derived, and best serves its compensatory purpose. Neither that purpose nor the cases support a requirement of specific intent.

Finally, we submit that the court below erred in exempting ALPA from any monetary liability for its clear statutory violation. The text, legislative history, and policies of the ADEA fully support the conclusion that unions which violate the Act's prohibitions are monetarily liable to the victims of their discrimination.

ARGUMENT

I. THE UNDISPUTED FACTS DEMONSTRATE THAT TWA'S AGE 60 POLICY CONSTITUTES A PER SE VIOLATION OF THE ADEA WHICH CANNOT BE JUSTIFIED UNDER THE EXCEPTIONS TO THE ACT

A. TWA's Practice of Involuntarily Retiring Captains and Refusing Their Transfer Requests At Age 60 is Unlawful

The ADEA prohibits an employer from discriminating against any employee between the ages of 40 and 70 "with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's age," and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2). The 1978 Amendments to the Act expressly forbid the involuntary retirement of any employee within the protected age group "because of the age of such individual" (29 U.S.C. 623(f)(2)). The court of appeals correctly held on undisputed evidence that TWA is in direct violation of these statutory prohibitions.

1. The policy that adversely affects TWA's captains here is age-based on its face. The company forces a captain to retire on his 60th birthday if he has not secured a flight engineer bid with an effective date prior to that date. TWA refuses to honor a bid for a vacancy carrying an effective date beyond a captain's 60th birthday because he is deemed to be retired at 60, and therefore stripped of the seniority that would entitle him to be awarded such a bid.

These facially age-based practices are not justified by the fact that a captain or co-pilot at age 60 is precluded from actively serving in those capacities by virtue of the FAA Age 60 Rule (14 C.F.R. 121.383(c)).[23] It is undisputed that TWA uniformly permits pilots who are disqualified from retaining their current positions for non-age related reasons to remain employed and to continue to accrue and exercise seniority. Such pilots thus may move, immediately or eventually, into positions for which they remain qualified. If any one of TWA's 3000 pilots is rendered ineligible to retain his captain or co-pilot seat because of a medical disability (and consequent failure to meet FAA requirements), or if he loses his position because of reduced flying requirements, he is entitled to exercise his seniority rights to displace a less senior flight

[23] The validity of the FAA Rule is not at issue in this case. See notes 29, 32 & 34, *infra*.

engineer or to be placed on unpaid leave until he accrues sufficient seniority to bid on and secure a position for which he is qualified. Similarly, if any one of TWA's pilots fails training to upgrade to captain or co-pilot, or displays such incompetence as to warrant discipline, that pilot is permanently and automatically downgraded to a position for which he remains qualified. TWA proffered no reason for denying the same treatment to the handful of older pilots,[24] similarly disqualified by virtue of the FAA regulation, who each year since 1978 have sought to continue working as flight engineers.[25]

2. The court of appeals correctly held that this "direct evidence of a differentiation based solely on age" (Pet.

[24] Seventy of the three or four hundred captains and first officers who reached age 60 between 1978 and 1981 have sought to continue working beyond that age (C.A. App. 189-190).

[25] TWA now suggests (Br. 12-13) that the difference in treatment is attributable to the fact that, while approximately 20 captains each year seek to continue employment as flight engineers after they reach 60, fewer pilots have invoked their contractual rights to move into alternative assignments upon loss of their present positions for non-age reasons. TWA conspicuously omits from this discussion any reference to its liberal transfer policy for pilots who lose their jobs because of operational cutbacks (page 12, *supra*). In any event, because the non-age transfer policies are included in the Working Agreement, TWA has committed itself to permit all younger jobless pilots to remain employed in alternative positions, regardless of the number of pilots involved.

TWA also cites (Br. 17 n.19) the arbitration decision denying respondent Thurston's contractual grievance claim (ALPA Br. in Op. App. B16-B19; C.A. App. 526-532) as evidence that its treatment of the younger pilots does not require it to treat the overage pilots similarly. But the arbitrator simply held that the contractual transfer provisions in the Working Agreement were not directly applicable to Thurston's age-based claim (ALPA Br. in Opp. B16-B18; C.A. App. 530-531). The arbitration decision "emphasized * * * that in deciding this case, the System Board renders no opinion with respect to any *legal* rights that Captain Thurston might have under the ADEA" (emphasis in original) (ALPA Br. in Opp. B13-B14; C.A. App. 530). Here, of course, those are the only rights in issue—there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement.

App. 24) established an unrebutted prima facie case. As in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the employer's claim that its practices were not motivated by a discriminatory intent, and thus that it cannot be liable under a discriminatory treatment theory, overlooks the fact that the challenged employment practice was discriminatory on its face. Here, as in *Manhart*, "[s]uch a practice does not pass the simple test of whether 'treatment of a person [is] in a manner which but for that person's [age] would be different'" (435 U.S. at 711). See also *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

Contrary to TWA's contention (Br. 22-25), *McDonnell Douglas Corp.* v. *Green*, *supra*, does not require respondent pilots and EEOC to establish a prima facie case by proof that there was a flight engineer vacancy at the time each captain applied. In *McDonnell Douglas*, a refusal to hire case, this Court set forth one mode of making a prima facie showing that the action complained of was based on a discriminatory criterion. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). As the court below recognized (Pet. App. A24), however, the *McDonnell Douglas* method of proof is not "an inflexible rule" (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575 (1978); *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983)); that method of proof was simply designed to assure "the plaintiff his day in court despite the unavailability of direct evidence." *Loeb* v. *Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979); see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 358 n.44. The court below correctly held that the *McDonnell Douglas* formula is inapposite where, as here, respondents' prima facie case of discriminatory treatment rests on "direct evidence of a differentiation based solely on age" (Pet. App. A24), *i.e.*, that TWA involuntarily retires and refuses transfers to pilots precisely because they have reached age 60, at the same time that it permits all similarly-situated younger pilots to continue their employment in positions for which they remain qualified. Accord, *Stone* v. *Western Air Lines, Inc.*, 544 F. Supp. 33, 36-37 (C.D. Cal. 1982), aff'd *sub nom. Criswell* v. *Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545; *Monroe* v. *United Airlines*, No. 83-1245 (7th Cir. May 30, 1984), slip op. 14-15.[26]

3. TWA's argument (Br. 16-20) that the holding below establishes an "extreme standard of liability", mandating "special treatment" or an age-based right to "accommodation" for older pilots, in contravention of the ADEA's legislative history and case law, is equally without merit.

Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits age discrimination with respect to the "terms, conditions, or privileges of employment." One "privilege" of a pilot's employment at TWA is the right to remain employed even though disqualified from retaining his current position, and to use his seniority to move into an alternative assignment for which he is qualified. Under the ADEA—like Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*)—a "benefit

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[26] Petitioner TWA's claim that there were no flight engineer vacancies the plaintiffs could fill simply begs the question. It is age, and not the lack of vacancies, that explains the difference in treatment between plaintiffs and TWA's younger pilots. When the latter need to change their status because they are unable to retain their present positions, they either displace junior pilots, thus creating their own "vacancies", or they wait on leave or furlough status until they can displace a junior pilot. If the same rules had been applied to plaintiffs as to their younger brethren, vacancies would have existed because seniority would determine their right to displace other pilots and they were the most senior pilots employed by TWA.

that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon* v. *King & Spalding*, No. 82-940 (May 22, 1984), slip op. 5. TWA's policy towards overage pilots violated this basic requirement because, as the court below explained (Pet. App. A31 (footnote omitted)):

> TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers * * *. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

That holding, which does no more than reiterate a basic principle of the ADEA, is entirely consistent with legislative intent and prevailing case law. Contrary to TWA's claim (Br. 18-19), the court clearly understood that the ADEA "does not require employers to provide special working conditions for older workers to allow them to remain or be employed" (H.R. Rep. 95-527, 95th Cong., 1st Sess. 12 (1977)), but simply mandates "that an employee's age be treated in a neutral fashion, neither faciliating nor hindering advancement, demotion, or discharge." *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, No. 82-459 (Jan. 10, 1983). Accord, *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 445 U.S. 943 (1982); *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978). Indeed, in rejecting TWA's argument that a ruling in favor of respondent pilots and EEOC required preferential treatment,[27] the court explained (Pet. App. A29-A30):

[27] TWA also incorrectly suggests (Br. 20) that EEOC seeks preferential treatment for age 60 captains or first officers. What EEOC will seek on remand is "such * * * equitable relief as may be appropriate to effectuate the purposes of [the] Act" (29 U.S.C. 626(b)) which, at a minimum, must permit captains and first officers to retain their positions until age 60 and then treat them like all similarly situated employees no longer able to perform their jobs for reasons other than age—*i.e.*, permit them to transfer to flight engineer positions if they have sufficient seniority to do so, or, if not, to remain on vacation and then leave without pay while accruing sufficient seniority to entitle them to a position (C.A. App. 841-842).

Equally spurious is TWA's claim that because "plaintiffs * * * get the same accommodations for non-age reasons as everyone else," the company has satisfied the ADEA by treating everyone equally (Br. 17). The fact that older pilots may be treated equally in other respects does not excuse the fact that age-60 pilots are the only pilots severed from the work force when they can no longer retain their present positions, nor does it shield TWA from liability for the age-based disparity in treatment between similarly situated pilots. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (a company cannot refuse to grant leaves of absence for pregnancy and avoid liability for sex discrimination by asserting that it grants leaves for other disabilities equally to both men and women).

Finally, there is no merit to TWA's claim (Br. 21-22) that it cannot be guilty of age-based discrimination because many older officers were successful in complying with the company's restrictive downbidding procedure. As the court below recognized, "[t]he ADEA, like Title VII, 'does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] * * * were hired. * * * Every *individual* employee is protected against * * * discriminatory treatment'" (Pet. App. A25, quoting *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982) (emphasis in original)). In any event, as the court further noted (*ibid.*), TWA's policy exacts a toll even from successful downbidders. These pilots are forced to bid for a vacancy substantially in advance of their 60th birthdays in order to avoid the risk that no vacancy will later be available, and to enter training and fill that vacancy as close as possible to its effective date. The result is that a captain perfectly capable and qualified to retain the position in which he has served the company for years is forced prematurely into the less prestigious and lower paying flight engineer job.

> [Respondents] merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing "special" or "preferential" about equal treatment.

B. TWA's Actions Are Not Covered by the "Bona Fide Seniority System" Exemption in Section 4(f)(2) of the ADEA

The district court held that TWA's actions were lawful under Section 4(f)(2) of the ADEA (29 U.S.C. 623(f)(2)) as taken "to observe the terms of a bona fide seniority system." (Pet. App. A59-A60.) According to the district court, TWA's bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner. * * * [A]ny denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The court of appeals disagreed, and correctly rejected TWA's seniority system defense under Section 4(f)(2) (Pet. App. A25-A26). TWA attempts to revive that defense in its brief on the merits in this Court (Br. 26-30) in the guise of a legitimate, nondiscriminatory reason for its actions under *McDonnell Douglas Corp.* v. *Green, supra.*[28] But however the argument is presented, TWA's seniority system cannot excuse the discrimination challenged here for two independent reasons: First, the statute, as amended in 1978, expressly excludes involuntary retirement from the types of personnel actions that can be immunized under Section 4(f)(2), and second, the action that injured respondent pilots was not based on TWA's seniority system.

Effective April 6, 1978, Section 4(f)(2) was amended to provide that no bona fide seniority system or benefit plan relied upon to excuse an employer's age-based personnel actions "shall require or permit the involuntary retirement of any [40 to 70 year-old] individual because of * * * age" (29 U.S.C. 623(f)(2)). The involuntary retirements challenged here all occurred after April 1978 (TWA Br. 13, n.16). Thus, even if, as TWA claims,

[28] We note that the question whether TWA's seniority system is a viable defense to liability was not presented in the company's petition for certiorari.

they resulted from its compliance with its bona fide seniority system, they would not be protected by Section 4(f)(2).[29]

In any event, there is nothing in TWA's seniority system that requires that over-age pilots be retired. That system is reflected in the company bidding procedure under which vacancies are awarded on the basis of seniority, determined by the date the pilot was hired by the company. It follows that if over-age captains were permitted freely to bid on flight engineer vacancies as they become available, each would eventually be successful precisely because seniority governs the award of bids. It is undisputed that the plaintiffs, and TWA captains generally, are at or near the top of the seniority list.[30] Thus, as the court of appeals observed, respondents "do not challenge the operation of the seniority system, but their summary exclusion from it at age 60" (Pet. App. A25-A26). The action which has injured respondents, and which is being challenged here, is TWA's decision that pilots in captain status when they reach 60 must be severed from employment and thus forfeit their seniority. It is this decision which underlies the company's requirement that a captain approaching age 60, in order to con-

[29] TWA attempts to answer this objection by asserting (Br. 28 n.35) that it is the FAA Age 60 Rule, rather than its seniority system, that "require[s] or permit[s]" the involuntary retirement of the over-age pilots. But the FAA Rule no more mandates retirement of these employees than the FAA Rule requiring that captains and co-pilots possess a first-class medical certificate mandates that those unable to maintain such certification be severed from the work force (see page 11, *supra*).

As the FAA has itself pointed out (C.A. App. 547-548): "[the] Age 60 rule does not ground a pilot or totally deny him the right to work as a pilot. He can be employed by an air carrier as a check pilot or flight instructor, provided he is not concurrently serving as a pilot flight crewmember in an operation under Part 121."

[30] For example, respondents Clark, Parkhill, and Thurston had 34, 33, and 36 years of seniority, respectively, when they were forced to retire (C.A. App. 919-921, 911-912, 903-905).

tinue working, must be awarded a flight engineer vacancy with an effective date prior to his 60th birthday (page 7, *supra*). This requirement precipitated the involuntary retirement of respondent captains, who failed to satisfy it. And it is this requirement, together with the more recent requirement that successful bidders fulfill their bids "in a timely manner," which has resulted in the constructive demotion of captains approaching 60, inasmuch as TWA typically now sends them through training and into the less prestigious and lower-paying flight engineer positions prior to their 60th birthdays.

TWA's Age 60 Policy cannot be legitimately explained by its seniority system nor defended under Section 4(f)(2) because, as the court below recognized (Pet. App. A26), TWA's decision to retire its captains when they reach 60 "is in no way mandated by the negotiated seniority system." Rather, the seniority provisions of the TWA-ALPA Working Agreement merely state that "[a]ny pilot whose services with the company are permanently severed shall forfeit his seniority rights" (page 8, *supra*). While it is certainly true that a rule governing the circumstances under which an employee's seniority is forfeited may be considered part of a "seniority system" (*California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980)), nothing in the Working Agreement requires TWA to "permanently sever[]" a pilot's employment simply because he can no longer serve as a captain or first officer.

It is clear that a successful defense of age-based personnel actions under Section 4(f)(2) requires a showing that the employer's action complied with an express provision of the seniority system or benefit plan relied upon. *Sexton* v. *Beatrice Foods Co.*, 630 F.2d 478, 483-488 (7th Cir. 1980); *EEOC* v. *Baltimore & O. Ry.*, 632 F.2d 1107, 1111 (4th Cir. 1980), cert. denied, 454 U.S. 825 (1981) ("A successful 4(f)(2) defense [under the pre-Amendment Act (see pages 22-23, *supra*)] requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management."). Cf.

United Air Lines, Inc. v. *McMann*, 434 U.S. 192, 196-197 (1977). TWA therefore cannot invoke the seniority system as a "legitimate, non-discriminatory" reason for the forced retirement and refusal to transfer age 60 captains, nor can those actions be defended as having been taken "to observe" the terms of its seniority system.[31]

C. TWA's Actions Are Not Covered by the Bona Fide Occupational Qualification Exemption in Section 4(f)(1) of the ADEA

TWA involuntarily retires 60-year old captains and copilots who seek continued employment as flight engineers —a job excluded from the FAA Rule, and for which TWA has never claimed that age 60 is a bona fide occupational qualification (BFOQ) (and, indeed, a job in which TWA employs persons older than 60). At the same time, the company uniformly retains younger pilots when non-age related factors render them incapable of occupying their present positions. In its brief as cross-petitioner (Br. at 4), ALPA attempts to justify this discrimination under Section 4(f)(1) of the ADEA, because age 60

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[31] Petitioner TWA also argues (Br. 19-21, 25 & n.30) that in ruling that its Age 60 policy was prima facie discriminatory, the court below improperly interfered with the company's seniority system and its collective bargaining agreement with ALPA. For the reasons stated in the text, the court's ruling does not implicate, much less denigrate, TWA's seniority system.

Nor does the court's ruling otherwise "ignore[] the need for TWA" to comply both with the ADEA and with "the legitimate considerations of the Working Agreement" (TWA Br. 20-21). The court properly faulted TWA for retiring 60-year-old captains when the Working Agreement provided for the continued employment of all other pilots disqualified from their present positions for non-age related reasons. The Agreement itself reserves to the company the right to keep those captains on the rolls beyond age 60 (pages 6-7, *supra*; see also Pet. App. A50-51; A13-A16). Contrary to TWA's implication, the court did not require the company to deviate from its Working Agreement by giving those captains an unconditional right to "displace" junior flight engineers. Whether that type of movement, rather than bidding for vacancies beyond age 60, should be ordered as "appropriate equitable relief" is a remedial question to be decided on remand (see note 27, *supra*).

is a BFOQ for the captain position.[32] This argument, which is supported neither by the text of the ADEA nor its legislative history, was properly rejected by the court below.

1. Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits an employer from discharging or otherwise discriminating against any individual on the basis of age. Section 4(f)(1) permits an employer to "take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). Because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it must be narrowly construed and may be invoked only if an employer proves "plainly and unmistakably" that its employment practice meets the terms and spirit of the provision. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Orzel* v. *City of Wauwatoso Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Arritt* v. *Grisell*, 597 F.2d 1267, 1271 (4th Cir. 1977); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 230 (5th Cir. 1976).

As the court below observed, the "terms of [§ 4(f)(1)] plainly reveal its purpose, which is to excuse only

[32] The EEOC has not, in this litigation, challenged the claim that the FAA's Age 60 Rule establishes a BFOQ for captains and first officers of commercial airlines and we do not do so here. Although the EEOC has questioned the justification for such a flat ban on the service of older pilots (see Comments of Constance Dupre, Associate General Counsel, EEOC, published in *Report of the National Institute on Aging Panel on the Experienced Pilots Study* C109-C115 (Dep't of Health & Human Services, Bethesda, Md. Aug. 1981)), it is clear that the regulation requires commercial airlines to comply with its terms. It does not, however, establish a BFOQ for flight deck positions not covered by the Rule (*Stone* v. *Western Air Lines, Inc.*, 544 F. Supp. 33, aff'd *sub nom. Criswell* v. *Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545).

those age-based actions against employees that are related to the "particular job'" (Pet. App. A28). Under the terms of Section 4(f)(1), the company could not, for example, refuse to consider an employment application submitted by a 60-year-old individual for a flight engineer position on the ground that age 60 is a BFOQ for the captain and co-pilot positions. Similarly, it cannot rely on the BFOQ exemption to sever from the work force because of his age a captain who seeks to transfer to a flight engineer vacancy. Section 4(a)(1) requires that the captain, like the applicant, be considered for the flight engineer seat under the same terms as other younger employees seeking transfers. He may not be refused that consideration simply because he is subject to a BFOQ under Section 4(f)(1) for an occupation to which he no longer makes any claim.

ALPA's contrary and utterly novel reading of Section 4(f)(1) rests on the assertion that the section permits an employer to "take any action otherwise prohibited"—and that "any action" must include involuntary retirement (ALPA Br. 15-18). This argument overlooks the fact that "any action" may be taken *only* "where age is a bona fide occupuational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). That language qualifies and limits the scope of the defense, and precludes its application here. In applying the section, the critical issue is whether the employer's age-based action implements an *occupational* qualification that is *reasonably necessary*; ALPA's construction would allow an age qualification justified in one occupation to be applied to others even "where" the age qualification is not "reasonably necessary" to "the particular business" of the other occupations. This reading ignores the terms and violates the purpose of the section, since it limits employment of older workers without serving any reasonable requirements of the employer.

The court below was thus faithful to the letter and spirit of Section 4(f)(1) in concluding that it does not sanction "an age-based refusal to consider a transfer ap-

plication submitted by a 60-year old downbidding captain, merely because age 60 is a BFOQ for the captain's former job" (Pet. App. A29). The court's holding does not "read a limitation into Section 4(f)(1)" (ALPA Br. 19); it merely applies the limitation inherent in its language: the only age-based actions that can be justified are those "reasonably necessary" to the demands of the job for which age is a BFOQ. Cf. *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982).

2. Nothing in the legislative history of the 1978 Amendments to the Act is inconsistent with this interpretation. The amendments were designed to strengthen and extend the ADEA. A primary impetus for the amendments was to overturn this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), which construed Section 4(f)(2) of the Act to permit the involuntary retirement of 60-year-old employees pursuant to a bona fide retirement plan that predated the 1967 enactment of the ADEA. The Amendments precluded such forced early retirement, and extended the Act's protections to persons up to age 70. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 8 (1978); H.R. Rep. 95-527, 95th Cong., 1st Sess. 1 (1977). Congress strongly reaffirmed the need "to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age" (S. Rep. 95-493, 95th Cong., 1st Sess. 1 (1977)). It would be incongruous in the extreme to conclude—as ALPA urges—that at the same time, Congress authorized the practices challenged here: the forced retirement of employees subject to a BFOQ in their original position, and the refusal to consider them, on the same terms as other employees, for jobs for which they remain qualified.

ALPA relies (Br. 9-10) on the legislative history surrounding a proposed Senate amendment to Section 4(f)(1) that would have added mandatory retirement to actions permitted in reliance on a BFOQ: in particular, ALPA cites the statement of the Conference Committee that the conferees agreed to withdraw the amendment

because it "neither added to nor worked any change upon present law" (H.R. Conf. Rep. 95-950, *supra*, at 7). But that statement sheds no light on what the "present law" requires with respect to age-based disparities in job transfer rights.

Similarly, the passages upon which ALPA relies (Br. 10-11) from the House Committee Report and floor debates referring to "jobs with unusually high demands" and "hazardous occupations" as examples of jobs from which mandatory retirement might be justified under Section 4(f)(1) (H.R. Rep. 95-527, *supra*, at 12; 123 Cong. Rec. 30566 (1977); 123 Cong. Rec. 34296 (1977)) do not support ALPA's interpretation. They simply indicate that nothing in the Act or the proposed Amendments requires an employer either to retain an employee in a position with a BFOQ lower than his age, or to give him special transfer rights not available to other younger employees. But neither these statements, nor the explanation for the withdrawal of the amendments to Section 4(f)(1) discussed above, indicate that Congress ever addressed the practice involved in this case—the discriminatory limitation of the opportunity to transfer from positions subject to a BFOQ to others not so subject. Still less do they indicate that Congress approved of this practice, which is entirely inconsistent with the ADEA's fundamental proscription of discriminatory working conditions (29 U.S.C. 623(a)(1)). Instead, we submit that Congress never specifically addressed the issue, but generally assumed that the BFOQ defense would apply only to actions relating to the particular job to which it applied.[33] As this

[33] The House Report reflects Congress's understanding that Section 4(f)(1) excuses age-based action only when the age qualification is "reasonably necessary to the normal operation of a particular activity * * *. [I]n some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers" (H.R. Rep. 95-527, *supra*, at 12). This language strongly suggests that the BFOQ defense is job specific: that age may not be considered in determining whether to transfer workers to other jobs for which age is not a BFOQ.

Court recently emphasized in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnotes omitted): "[I]f * * * Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administration interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." As we have shown, the agency answer here is entirely justified by the statute and the policies it is designed to further.[34]

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[34] Our construction comports with the government's consistent position on the relationship between the FAA rule and the ADEA's requirements. In a series of opinion letters issued on May 4, 1979, the Department of Labor explained (C.A. App. 971, 869-871):

> While the FAA Rule does not permit persons over age 60 to function as pilots in scheduled carrier operations, it does not require compulsory retirement. Thus, pilots approaching age 60 who wish to continue employment in positions which do not fall within the Age 60 rule (such as flight instructor, check pilot, or flight engineer) must be considered for such employment without regard to age on the same basis as other employees or applicants.
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> In summary, while the ADEA does not require that a carrier provide, in each and every case, an alternative assignment for pilots subject to the FAA's Age 60 Rule, such persons must be considered for reassignment (or training prior to reassignment) to positions not covered by the Rule. Age must not be either a direct or indirect consideration; the 60-year-old pilot must be treated on the same basis as other employees or applicants for employment.

This interpretation remained in effect after the EEOC assumed jurisdiction over the ADEA in July 1979 (see 44 Fed. Reg. 37974 (1979)) and, though technically superseded since the EEOC's promulgation of its own ADEA regulations in 1981 (see 46 Fed. Reg. 47724 (1981)), continues to reflect the Commission's position on this issue.

II. THE COURT BELOW PROPERLY AWARDED LIQUIDATED DAMAGES TO THE PLAINTIFFS

A. A Company That Intentionally Treats Workers Less Favorably Because Of Their Age Is Liable For Liquidated Damages If It Knew Or Should Have Known That Its Actions Were Governed By The ADEA

Section 7(b) of the ADEA provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211 (b), 216, 217)" (Pub. L. No. 90-202, 81 Stat. 604, 29 U.S.C. 626(b)). Sections 16(b) and 16(c) of the FLSA authorize the recovery of back wages and benefits, as well as "an additional equal amount as liquidated damages."[35] This provision for liquidated damages is, however, modified by Section 7(b) of the ADEA, which states that such damages are to be awarded "only in cases of willful violations."[36]

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[35] TWA incorrectly contends (Br. 37 n.49) that the government cannot recover liquidated damages under the ADEA because Section 16(c) of the FLSA did not authorize such recovery in 1967, when the ADEA was enacted. *Hasset* v. *Welch*, 303 U.S. 303 (1938), on which TWA relies, refers, in dicta, to the "well settled canon" that where a statute is adopted by reference, the adoption "does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." 303 U.S. at 314. There is such express intent here. The explicit incorporation of the FLSA enforcement mechanisms "as amended" makes clear that the ADEA is to be enforced under the FLSA as it may read thereafter. In addition, Congress was fully aware of the interrelationship of the two Acts when it authorized the government to obtain liquidated damages under Section 16(c) in 1974; the Fair Labor Standards Amendments of 1974 explicitly amended both the FLSA and the ADEA. Pub. L. No. 93-259, §§ 26, 28, 88 Stat. 73, 74; H.R. Rep. 93-913, 93d Cong., 2d Sess. 40 (1974); *EEOC* v. *Gilbarco, Inc.*, 615 F.2d 985, 989 (4th Cir. 1980).

[36] In contrast, Section 11 of the Portal-to-Portal Pay Act of 1947, 29 U.S.C. 260, grants trial courts discretion to deny or reduce liquidated damage awards in FLSA suits under Section 16(c) if

The court below correctly awarded liquidated damages. We submit that where an employer intentionally discriminates on the basis of age, the violation is willful if the employer knew or should have known that its actions were governed by the Act. Because TWA obviously knew that its Age 60 Policy was governed by the ADEA as amended in 1978, it is liable for liquidated damages.

1. The term "willful violations" appears in a similar civil context in Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended, 29 U.S.C. 255(a), which extends the limitations period from two to three years for "willful violations" of the FLSA. This statute of limitations provision, enacted one year before the ADEA in 1966,[37] is specifically incorporated into the ADEA (§ 7(e)(1), 29 U.S.C. 626(e)(1)).

The courts of appeals have uniformly held that Congress used the term "willful violations" in Section 6(a) of the Portal-to-Portal Pay Act to describe situations in which the employer took actions in fact prohibited by the statute and was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions. *EEOC v. Central Kansas Medical Center*, 705 F.2d 1271, 1274 (10th Cir. 1983); *Marshall* v. *Erin Food Services, Inc.*, 672 F.2d 229, 230 (1st Cir. 1982); *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983); see

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the employer establishes a good faith defense to its violations of the wage-hour law. As this Court has noted, "[a]lthough § 7(e) of the ADEA, 29 U.S.C. § 626(e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act * * *, the ADEA does not make any reference to § 11, 29 U.S.C. § 260." *Lorillard* v. *Pons*, 434 U.S. 575, 582 n.8 (1978). Of the eight circuits that have addressed the issue, only the Fifth Circuit has held 29 U.S.C. 260 applicable to ADEA actions. *Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 228 (6th Cir. 1983) and cases collected therein.

[37] Pub. L. No. 89-601, Tit. VI, § 601(b), 80 Stat. 844.

Spagnuolo v. *Whirlpool Corp.*, 641 F.2d 1109, 1113-1114 (4th Cir. 1981). Cf. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) ("at the very least the employer's noncompliance is willful when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt").[38]

Equally well-recognized is the "natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States, Inc.*, 286 U.S. 427, 433 (1932). See 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 51.08 & n.6 (4th ed. 1973). Here, the same Congress that added Section 6(a) to the Portal-to-Portal Pay Act in 1966—using the term "willful violations" broadly to describe actions that in fact violate the statute when taken with knowledge of an appreciable possibility that the statute applies—one year later incorporated that provision into the ADEA and at the same time determined that liquidated damages would be available for such "willful violations." There is thus a strong presumption that Congress intended that the term have the same meaning in Section 7(b) as it had in Section 7(e)(1): that liquidated damages should be awarded

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[38] In addition, the courts have unanimously rejected any specific intent requirement. *E.g.*, *Marshall* v. *Erin Food Services*, 672 F.2d at 231 ("[n]either bad faith nor knowledge that a particular practice violates the Act is required"); *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d at 1092-1093) ("Reliance on erroneous advice is no bar to a finding of a 'willful' violation, except for a good faith reliance upon advice rendered by an appropriate government agency."); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d at 1141-1142 (reliance on counsel's advice no defense); *Laffey* v. *Northwest Airlines*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) (employer's noncompliance is willful when he "consciously and voluntarily charts a course which turns out to be wrong"); *Donovan* v. *Carl's Drug Co.*, 703 F.2d at 652 ("neither a good faith belief in the lawfulness of his * * * regulations nor complete ignorance of their invalidity shield the employer"); see *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d at 1113-1114 (employer's good faith belief in the lawfulness of his policies is no defense).

upon a showing that the employer knew the ADEA governed its actions. Contrary to the claim of TWA (Br. 33-35) and its amici (Equal Employment Advisory Council (Br. 8-22); United States Chamber of Commerce (Br. 6-10)), nothing in the legislative history of the ADEA's liquidated damages provision defeats this presumption, or suggests that it was to apply only when the employer intended to violate the Act. Such a specific intent requirement is inconsistent with court of appeals decisions interpreting Section 7(b).

2. Section 7(b)'s provision for liquidated damages derived from an amendment proposed by Senator Javits to the Administration's age discrimination bill. S. 830 and H.R. 3651, 90th Cong., 1st Sess. (1977); 113 Cong. Rec. 2794-2796 (1967). As introduced, the bill would have imposed crimina[illegible]nalties for willful violations (*id.* § 11(b), 113 Cong. Rec. [illegible]). Senator Javits' substitute bill replaced this crimina[illegible]vision with the civil remedy of liquidated damages (113 Cong. Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess. § 7(b) (1967) as reported from the Senate Committee on Labor and Public Welfare. 113 Cong. Rec. 31248 (1967)).

The change from criminal to civil penalties was designed to facilitate enforcement by avoiding "difficult problems of proof which would arise under a criminal provision," [39] and the possible invocation of Fifth Amendment protection that could impede investigation, conciliation, and enforcement (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits); see also *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (*Senate*

[39] Although a criminal sanction can be imposed only after guilt is established by proof beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)), civil damages may be assessed if a violation is shown by a preponderance of the evidence (see, *e.g.*, *Strachan Shipping Co.* v. *Shea*, 406 F.2d 521, 522 (5th Cir.), cert. denied, 395 U.S. 921 (1969)).

Hearings)).[40] The change was thus designed to broaden, not to narrow, the applicability of the liquidated damages provision, to assure that it would "furnish an effective deterrent to willful violations" (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits)).

This purpose would not be achieved by limiting the recovery of liquidated damages to those situations in which the employer can be shown to have intended to violate the Act. The discrimination that Congress sought to deter was generally understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers. *Age Discrimination in Employment, Hearings on H.R. 3651, et al., Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess., 6, 8, 13 (1967) (*House Hearings*).[41] To serve as an

[40] Sen. Javits (*id.* at 27) there testified that "there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings."

[41] See also U.S. Department of Labor, *The Older American Worker; Age Discrimination in Employment, A Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964*, at 2, 3 (1965) ("discrimination in the nonemployment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions* * * *. The discrimination older workers have most to fear * * * is not from any employer malice"); 113 Cong. Rec. 31254 (1967) (Sen. Javits) ("What we have learned, essentially, is that a great deal of the problem stems from pure ignorance; there is simply the widespread irrational belief that once men and women are past a certain age they are no longer capable."); *id.* at 31256 (Sen. Young) ("Medical science and other factors have vastly increased * * * life expectancy. * * * [The] view of 65 being the proper age for retirement * * * [is] outdated and outmoded."; *id.* at 34740 (Rep. Perkins) (statute addresses "long-standing misconception about the employability of older workers and certain economic factors"); *id.* at 34742 (Rep. Burke) ("Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These result * * * [from] feelings about a person en-

effective deterrent to discrimination that Congress understood to be more thoughtless than malicious, liquidated damages must be available on a basis that will prompt "employers everywhere * * * [to] take a look at their * * * policies" (113 Cong. Rec. 31257 (1967) (Sen. Young)), and "bring about a basic change in public attitude toward the value of the older worker." *Id.* at 34744 (Rep. Hawkins). Defining a violation as "willful" whenever the employer intentionally discriminates on the basis of age and is, or should have been, aware of the applicability of the ADEA properly promotes this deterrent purpose.

TWA (Br. 34) and amici (EEAC Br. 11-12; Ch. Com. Br. 8) argue that the ADEA liquidated damages provision is punitive, and so should be available only when the employer can be shown to have intentionally violated the Act.[42] But the legislative history of the liquidated damages provision in the ADEA—as in the FLSA—shows that such damages are designed to provide full compensation to the employee, rather than primarily to punish the employer. Thus, Congress focused on the need to be fair to the *employee*, and to provide him full compensation for

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tirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.").

[42] Their related argument (TWA Br. 31-33; EEAC Br. 8, 22; Ch. Com. Br. 7-8)—that the imposition of liquidated damages whenever there is a finding of discriminatory treatment with knowledge of the applicability of the Act leaves the "willfulness" limitation out of the Act—has no more merit here than it does in the Portal-to-Portal Act context. There, the courts have consistently rejected the argument, recognizing that the only employers who can claim not to have acted willfully are those "who were unwittingly intercepted by the [newly expanded] Act" (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d at 461; see cases cited, page 32, *supra*). In addition, it may well be that where an employee has shown that facially neutral employer practices have a discriminatory impact, the court might conclude that the employer had no reason to be aware of the applicability of the ADEA to those practices. In that case, liquidated damages would not be available.

nonpecuniary damages not readily calculable, including emotional injuries such as humiliation and loss of self respect. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978); cf. D. Dobbs, *Handbook on the Law of Remedies* 135-136 (1973); *Kolb* v. *Goldring*, 694 F.2d 869, 872 n.2 (1st Cir. 1982); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982). The legislative purpose would be defeated if the mere fact that an employer had an arguable legal position were held to preclude application of the liquidated damages provision to its deliberate age-based disparate treatment of employees covered by the Act.

Even if the legislative history were less explicit, liquidated damages under the ADEA should be deemed to serve the same compensatory purpose this Court recognized in the FLSA provisions from which they were taken (*Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583 (1942)).[43] As the Court noted in *Lorillard* v. *Pons*, 434 U.S. at 581:

> [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to

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[43] This purpose was not altered by Congress's later enactment of Section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. 260, which eliminated the mandatory nature of the award and gave trial courts discretion to deny or limit liquidated damages where an employer shows that it acted in good faith. See H.R. Rep. 71, 80th Cong., 1st Sess. 3, 8 (1947); *Thompson* v. *Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982) ("Nothing in the statutory history of the Portal Pay Act suggests that Congress was dissatisfied with the determination that liquidated damages were compensatory. * * * Allow[ing] courts to balance compensating employees against imposing costs on employers hardly transforms the award to a penalty." (citations and footnote omitted)).

depart from those provisions regarded as undesirable or inappropriate for incorporation.

The fact that Congress changed the automatic liquidated damages provision in the FLSA to one providing liquidated damages for willful violations does not imply either that liquidated damages were not to be considered compensatory, or that the words used were to have a different meaning in the new context. Instead, Congress simply concluded that the narrow class of employers who were not "willful" violators under Section 6(a) of the Portal-to-Portal Act should also be excused from providing full compensation to employees injured by actions taken without any consciousness that they might violate the ADEA.[44]

3. Several courts of appeals have recognized that the history and statutory context of Section 7(b)—against which its use of the term "willful violations" must be construed (*Spies* v. *United States*, 317 U.S. 492, 497 (1943); *United States* v. *Bishop*, 412 U.S. 346, 356 (1973))—fully support the presumption that Congress meant, by requiring liquidated damages for "willful violations" in Section 7(b), to cover precisely the same "willful violations" it made subject to the longer statute of limitations in 7(e): intentionally discriminatory acts committed with actual or constructive knowledge that the ADEA applied.[45] The Fourth, Fifth, and Tenth Circuits have accordingly applied the statute of limitations standard in the liquidated damages context. *Crosland* v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick* v. *Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980). See also *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184-1185 (6th Cir. 1983) (crucial question is "whether the employer deliberately, intentionally, and knowingly discharged the employee because of his age"); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981) (same, semble).

Conversely, the "specific intent" standard urged by TWA and its amici has been roundly rejected. Of the nine courts of appeals that have addressed the question, all but one have agreed that proof of specific intent to violate the ADEA is not a precondition to an award of liquidated damages. *Blackwell* v. *Sun Electric Corp.*, 696 F.2d at 1184-1185; *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155-156 (7th Cir. 1981); *Hedrick* v. *Hercules*, 658 F.2d at 1096; *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d at 1114; *Kelly* v. *American Standard, Inc.*, 640 F.2d at 980; *Mistretta* v. *Sandia Corp.*, 639 F.2d at 595; *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 283 (1980); *Goodman* v. *Heublein, Inc.*, 645

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[44] The legislative history of Section 7(b), read against the law under Section 16(a) of the FLSA, also supports the standard urged here. Under Section 16(a)—which Congress chose not to incorporate into the ADEA—criminal penalties attach for willful violations of the wage-hour law. At the time Congress was enacting the ADEA, the courts had held consistently that this provision did not require that the offense "be committed malevolently, with a bad purpose or an evil mind"; rather, "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co.* v. *United States*, 190 F.2d 478, 480 (10th Cir.), cert. denied, 342 U.S. 876 (1951); accord, *Hertz Drivurself Stations* v. *United States*, 150 F.2d 923, 928-929 (8th Cir. 1945); *United States* v. *Fidanian*, 465 F.2d 755, 760 (5th Cir. 1972). Inasmuch as Congress substituted the ADEA's civil remedy of liquidated damages for criminal penalties in order to avoid proof problems (see p. 34, *supra*), Congress could not have intended a more rigorous standard of proof for liquidated damages than for criminal violations of the FLSA.

[45] Although one court has refused to require any proof regarding the defendant's state of mind towards the statute for fear of "encouraging employers to know as little as possible about the ADEA" (*Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); cf. *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983)), only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. 627.

F.2d 127 (2d Cir. 1981), but see *Loeb* v. *Textron*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (dicta).[46]

B. The Undisputed Facts Of This Case Compel The Conclusion That TWA's Violation Was Willful

The undisputed evidence compels the conclusion that TWA's ADEA violation was "willful" under the definition of that term that Congress clearly intended. Accordingly, the court below properly awarded liquidated

[46] Contrary to TWA's assertion (Br. 31-32), the First Circuit in *Loeb* v. *Textron*, *supra*, which was decided before any court of appeals had considered the issue, did not purport to decide under what circumstances an employer's ADEA violation would be deemed willful. The *Loeb* footnote merely quotes the definition of willfulness from jury instructions concerning mens rea in a criminal context (1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977) which, we submit, is inapposite in civil cases.

Nor does the Seventh Circuit require specific intent (TWA Br. 31-32). That the Seventh Circuit was not setting forth a specific intent requirement in *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, *supra*, is evidenced by its statement that a violation is willful if the employer's "actions were knowing and voluntary and * * * he knew or *reasonably should have known* that those actions violated the ADEA" (665 F.2d at 156 (emphasis supplied)) and its statement that the test it had articulated "is consistent with the standard endorsed in * * * *Goodman* v. *Heublein*" (*id.* at 155 n.9). Any contrary implication was dispelled by the subsequent affirmance of a finding of willfulness that explicitly comported with the Third Circuit's *Wehr* standard, which expressly excludes a showing of specific intent. *Orzel* v. *City of Wauwautosa Fire Dep't*, 697 F.2d 743 (1983), cert. denied, No. 83-205 (Nov. 28, 1983).

Similarly, *Koyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1161 (S.D.N.Y. 1983), and *Whittlesey* v. *Union Carbide Corp.*, 567 F. Supp. 1320 (S.D. N.Y. 1983), also recognize that constructive knowledge of or disregard for the proscriptions of the ADEA will justify liquidated damages. See *Koyen*, 560 F. Supp. at 1166 (approving liquidated damages where "the defendant deliberately, intentionally and knowingly discharged plaintiff because of his age, and * * * knew or *should have known* such conduct was unlawful) (emphasis supplied); *Whittlesey*, 567 F. Supp. at 1330 (agreeing that *Koyen* required a showing that the employer acted with knowledge of the illegality of his action or "at least an inexcusable disregard").

damages at this stage of the case. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). TWA knew that its Age 60 Policy for the continued employment of all flight deck crew members was governed by the ADEA; indeed, that policy was promulgated in direct response to the 1978 Amendments (Pet. App. A4, A8-A9; pages 4-10, *supra*). Moreover, as we have shown (pages 15-21, *supra*), the policy on its face discriminates against pilots covered by the Act on the basis of their age; it is a policy of explicit age-based disparate treatment.

While the foregoing is sufficient to satisfy the Act's standards in our view, here, as the court below concluded (Pet. App. A33-A34), the evidence also shows that the employer acted with "reckless disregard" for whether his actions violated the ADEA. Specifically, the evidence summarized above shows that the policy originally developed by the responsible TWA official imposed no improper restrictions on the transferring pilots. When that official became incapacitated, his successor, acting on his own personal aversion to the continued service beyond age 60 of pilots in any cockpit position, imposed restrictions on transfers of over age captains without regard to the requirements of the ADEA (pages 4-6, *supra*).

III. A UNION THAT VIOLATES THE ADEA IS LIABLE FOR MONETARY RELIEF

Section 4(c)(3) of the ADEA makes it unlawful for a union "to cause or attempt to cause an employer to discriminate" against a worker protected by the Act. The court below concluded that "ALPA actively campaigned to persuade TWA to retain its age 60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA" and, subsequent to the 1978 ADEA amendments, "negotiated, signed, and administered a Working Agreement * * * requiring retirement of all flight deck personnel at 60" (Pet. App. A32-A33).[47]

[47] As the court below correctly held (Pet. App. A32), ALPA is independently liable as a signatory to the Working Agreement in

ALPA does not here contest this conclusion.[48] Based on this finding of culpability, the court originally concluded that "appellants are entitled to recover back pay * * * against the union" (Pet. App. A34). In response to ALPA's petition for rehearing, however, the court amended its decision to absolve ALPA of any monetary liability, holding that the ADEA does not provide for monetary relief against a union (Pet. App. A37-A39). Relying on *Neuman* v. *Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1488 (N.D. Ill. 1982), and *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975), the court reasoned that because unions cannot be sued under Section 16(b) of the FLSA (29 U.S.C. 216(b)), and because Section 16(b) is incorporated into the ADEA, unions cannot be liable for back pay or other monetary relief under the ADEA (Pet. App. A37-A39).

This reasoning ignores the fact that, in addition to Section 16(b) of the FLSA, the ADEA includes three other sources of enforcement authority. The text of these provisions, as well as the legislative history and policies of the ADEA, make clear that unions may be required to

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effect after the 1978 ADEA amendments, which violated the amended Act by providing for involuntary retirement of pilots at age 60. Cf. *Patterson* v. *American Tobacco*, 535 F.2d 257, 270 (4th Cir.), cert. denied, 429 U.S. 920 (1976) (Title VII); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) (same); Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 704-705 (1980).

In addition, it is undisputed that ALPA "attempt[ed] to cause" TWA to discriminate against over-age-60 pilots, in violation of Section 4(c), by proposing that TWA furlough over-age-60 flight engineers before other flight engineers, regardless of company seniority, and that over-age-60 flight engineers be assigned a new seniority date corresponding to the date on which they qualify as flight engineers, thus making them most susceptible to lay-off (note 17, *supra*).

[48] ALPA does argue that TWA's actions did not constitute a violation of the ADEA, but it does not pursue the argument made below that the record does not establish the Union's participation in those actions. There is, accordingly, no need for this Court to address that purely factual question.

provide monetary relief to the victims of their discrimination.

A. The Text and The Legislative History of the Act Support the Award of Monetary Relief Against ALPA

Section 7(b) of the ADEA (29 U.S.C. 626(b)) provides that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the Fair Labor Standards Act], * * * and subsection (c) of this section [29 U.S.C. 626(c)]." Section 16(b) of the FLSA, 29 U.S.C. 216(b), authorizes employees to sue their employer for back pay and liquidated damages. Section 16(c) of the FLSA authorizes government suits for pay and damages; it contains no language providing that only employers may be so sued. Section 17 of the FLSA, 29 U.S.C. 217, grants equitable jurisdiction to the district courts to enjoin violations, and to order payment of back pay. Again, this Section contains no limitation to suits against employers. While the government alone can initiate Section 17 suits under the FLSA (§ 11(a) of the FLSA, 29 U.S.C. 211(a)), this limitation does not apply to the ADEA, because the limiting language of Section 11(a) of the FLSA is not incorporated into the ADEA. Moreover, Section 7(b) of the ADEA specifically authorizes "such [legal and equitable] relief [as may be appropriate] '[i]n any action brought to enforce th[e] Act'." See *Lorillard* v. *Pons*, 434 U.S. at 581.

Finally, Section 7(c)(1) of the ADEA independently authorizes "[a]ny person aggrieved [to] bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act" (29 U.S.C. 626(c)(1)). This section contains no language suggesting that unions may not be sued. Indeed, in striking contrast to Section 16(b) of the FLSA, it refers to "any person aggrieved", rather than to "one or more employees" in describing who is entitled to sue.

Thus, the enforcement provisions of the FLSA, as modified and incorporated into the ADEA by Section 7(b) of that Act, permit a private plaintiff to sue an employer for pay and liquidated damages (FLSA § 16(b)) or any violator—including a union—for injunctive relief (FLSA § 17), which includes back pay. The government may sue any violator for pay and damages (FLSA § 16(c)) or for injunctive relief (FLSA § 17). Finally, Section 7(c)(1) of the ADEA, by expressly permitting a separate private cause of action to provide "such legal or equitable relief as will effectuate the purposes of the Act", eliminates any possible discrepancy between the substantive provisions of Section 4, which apply to unions and employment agencies as well as employers, and the enforcement provisions of Section 7: private plaintiffs may obtain liquidated damages as well as pay from any violator, including employers, unions or employment agencies.

2. The legislative history strongly supports this reading of the statute. As this Court has recognized, the ADEA was a "hybrid" of several approaches. *Lorillard* v. *Pons*, 434 U.S. at 578. The original administration bill contained the same substantive prohibitions as the resulting statute, but the enforcement provisions were modeled after Section 10 of the National Labor Relations Act (29 U.S.C. 160), and provided for administrative enforcement by the Secretary of Labor. S. 830, *supra*, §§ 4, 7; 113 Cong. Rec. 2794-2795 (1967). Labor unions were clearly answerable for money damages, since the Secretary's authority to order back pay ran against "any person [who] has engaged in an unlawful practice" (S. 830, *supra*, § 7; 113 Cong. Rec. 2795 (1967)).

Opposition to this enforcement scheme came primarily from business groups, not unions.[49] The AFL-CIO did

[49] The employer associations recommended enforcement modeled after the FLSA because they preferred the neutral adjudication of the federal district courts, because Wage and Hour personnel were readily available, and because the procedures were familiar. See *Senate Hearings* 113 (Chamber of Commerce); *id.* at 256 (American Retail Association of America); *id.* at 256 (American Retail Federation); *id.* at 324 (National Association of Manufacturers); *id.* at 396 (National Retail Merchants Association); *House Hearings* 67 (Chamber of Commerce); *id.* at 141 (American Retail Federation). None of these employer representatives suggested that labor unions should be exempted, or that the proposed amendments would have that effect.

object to any union liability under the ADEA, and accordingly proposed the deletion of Section 4(c) of the administration bill, which outlawed discriminatory labor union practices. Testimony of Andrew J. Biemiller, AFL-CIO Legislative Director, *Senate Hearings* 97; Amendment to Exclude Labor Organizations, *id.* at 100.[50] But, when asked about enforcement procedures, the union representative testified that the choice between the NLRA model—under which unions were unquestionably liable for back pay—and that of the FLSA was not "of critical importance" to the AFL-CIO (Testimony of Kenneth Meiklejohn, *House Hearings* 421). Labor Secretary Wirtz agreed that the differences between the two enforcement schemes were "not basic" and were "more in detail than in the larger effect" (*House Hearings* 13).

The Senate Committee Report provides additional evidence that Congress did not intend to excuse unions from the payment of money judgments. Section 7(e) of the ADEA (29 U.S.C. 626(e)) incorporates by reference Section 10 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259), which provides a defense for the failure to "pay minimum wages or overtime compensation" under the FLSA where the employer proves good faith reliance on an administrative interpretation of the law. While Section 10 by its terms allows only employers to invoke the defense, the Senate Report explicitly states that "[u]nder section 10 of the Portal-to-Portal Pay Act any employer, employment agency, or *labor organization* that relies in good faith upon written administrative regulations * * * has a valid defense" (emphasis added). S. Rep. 90-723, 90th Cong., 1st Sess. 10 (1967).

[50] Congress subsequently enacted that section verbatim as Section 4(c) of the ADEA (29 U.S.C. 623(c)).

The purpose of Section 10 of the Portal-to-Portal Act is to give protection from money judgments (see Section 2 of the Act, 29 U.S.C. 251); the defense does not affect prospective injunctive actions. *Western Union Telephone Co.* v. *McComb*, 165 F.2d 65, 73 (6th Cir. 1947), cert. denied, 333 U.S. 862 (1948). The statement of the Senate Committee, therefore, is further indication that Congress intended to expose unions to monetary liability for violating the ADEA; if this were not the case, the Senate Committee senselessly extended to unions a defense to claims for which they would not, in any event, be liable.

B. The Policies Of The Act Support Union Liability

A comparison of the underlying purposes of the FLSA and the ADEA further supports the conclusion that there was no intent to limit the monetary liability of unions under the ADEA. The enforcement scheme of the FLSA is designed to deprive employers of the economic benefits they derive from paying substandard wages, and to protect the competitive positions of employers who do comply with the Act. 29 U.S.C. 202(a)(3); *United States* v. *Darby*, 312 U.S. 100, 115 (1941). It is therefore arguable that if unions were held liable for monetary damages under the FLSA, offending employers might be enabled to defeat this statutory purpose by retaining, in whole or part, the fruits of their illegality.[51] There is no comparable countervailing consideration in the statutory goals of the ADEA, since the employer gains no economic benefit from its own or the union's discrimination against older workers. Indeed, in enacting the ADEA, Congress emphasized that older workers are valuable employees, and that discrimination against them is often based on ignorance concerning their true capabilities (see pages 35-36, *supra*).[52]

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[51] See discussion in our Brief at 18-23 in *Northwest Airlines, Inc.* v. *Transportation Workers of America*, No. 79-1056.

[52] *Neuman* v. *Northwest Airlines, supra*, relied upon by the court below, therefore wrongly decided that because employees cannot sue unions for damages under the FLSA, unions are also immune from money judgments under the ADEA. Union liability under the FLSA is simply not determinative under the different legislative scheme and policy of the ADEA. The only other courts that have addressed the issue have held that non-employer defendants which have violated the ADEA are liable for monetary relief, based on the Act's specific grant of jurisdiction to award whatever relief is necessary to effectuate its purposes. *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981) (union liability); *Brennan* v. *Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. (CCH) ¶ 9571 (W.D. Ky. 1974) (employment agency liability).

Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D. N.Y. 1975), also cited by the court below, is inapposite. That case dealt with the Equal Pay Act of 1963 (EPA) (29 U.S.C. 206(d)), not the ADEA, and there are substantial differences between the two statutes; the EPA is an amendment to the FLSA and the ADEA is not (*Lorillard* v. *Pons*, 434 U.S. at 578), and unlike the ADEA, the EPA is based on a theory of unjust employer benefit through substandard wages. In any event, *Emerald Renovators* recognized the possibility of back pay liability as an equitable remedy under Section 17 of the FLSA, citing *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd *sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). *Sagner* held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the EPA (29 U.S.C. 206(d)(2)). 326 F. Supp. at 373.

The reasons relied on in *Emerald Renovators, Inc.*, to limit union liability under the EPA are not applicable here. First, the court pointed to the language of Section 16(b) of the FLSA granting employees the right to sue their *employers*. 410 F. Supp. at 1059 n.5. Under the enforcement scheme of the ADEA however, this limiting language is not controlling: as we have shown, Section 7(c) of the Act, and Sections 16(c) and 17 of the FLSA as incorporated, are not limited to actions against employers. *Emerald Renovators* also reasoned that because Sections 16 and 17 of the FLSA refer to wages "unpaid" or "withheld," only employers can be made liable since it is only employers that can fail to pay or withhold wages. 410 F. Supp. at 1062. Whatever the merits of this argument as applied to FLSA or EPA suits, it is unavailing in the ADEA context. Section 7(b) of the ADEA (29 U.S.C. 626(b)) refers more generally to "[a]mounts owing to a person as a result

Moreover, the broad purpose of the ADEA, like Title VII, is prophylactic as well as remedial. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). The

Act's declaration of policy itself states that it is designed "to promote employment of older persons based on their ability rather than age [as well as] to prohibit arbitrary age discrimination in employment" (29 U.S.C. 621(b)).

As this Court recognized in *Albemarle Paper Co., supra*, the threat of financial liability is essential to fulfilling a prophylactic purpose, because it is the prospect of a monetary award "that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges [of discrimination].'" 422 U.S. at 417-418. See *Owen* v. *City of Independence*, 445 U.S. 622, 651-652 (1980).

Thus, although holding employers monetarily liable may ordinarily be sufficient to fulfill the remedial purpose of the ADEA,[53] exposing unions also to such liability significantly furthers the prophylactic purpose of the statute. The broad prohibitions against union discrimination contained in Section 4(c), (d) and (e) of the Act (29 U.S.C. 623(c), (d) and (e)) are clear evidence of Congress's understanding that labor organizations can play a major role in promoting and maintaining age bias in the work place. Unions will have little incentive to shun such practices unless they are held responsible, along with employers, for the economic injury suffered by the victims of their discrimination.

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of a violation of this Act" and provides that such amounts "shall be deemed" to be unpaid minimum wages or overtime compensation. Thus, once a violation has been shown, the harm which the violator has caused becomes an amount owing; this amount is then to be treated *as if it were* unpaid minimum wages or overtime compensation for purposes of collection. Where, as here, the union and the employer have violated the Act, creating amounts owed to victims of discrimination, both defendants may be held liable for these amounts.

[53] It might not be sufficient in a case involving a union violation of 29 U.S.C. 623(c)(2) by discrimination in the referral of its members for employment. If the employer were not implicated in the violation, the victim's only recourse would be recovery of damages against the union.

CONCLUSION

The judgment of the court of appeals holding that TWA and ALPA violated the ADEA in involuntarily retiring pilots and first officers when they reach 60, and that TWA is liable for liquidated damages, should be affirmed. The judgment that ALPA is not liable for damages should be reversed.

Respectfully submitted.

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APPENDIX

In addition to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), as amended (29 U.S.C. 621 *et seq.*) and the Federal Aviation Administration's Regulation set forth at Pet. 2-5, the following statutory provisions are also relevant:

Section 7(c)(1) of the ADEA (29 U.S.C. 626(c)(1)):

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Commission to enforce the right of such employee under this chapter.

Section 7(e)(1) of the ADEA (29 U.S.C. 626(e)(1)):

> Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

Section 16(b) and (c) of the Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 216(b) and (c)), provide in pertinent part:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against

any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount of liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in any action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary.

Section 17 of the FLSA (29 U.S.C. 217) provides:

> The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction for cause

> shown to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of the Portal-to-Portal Pay Act of 1947).

Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended (29 U.S.C. 255(a)) provides in pertinent part:

> Any action commenced on or after May 14, 1947 to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> (a) if the cause of action accrues on or after the May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Section 10(a) of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259(a)) provides in relevant part:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in re-

liance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

Section 11 of the Portal-to-Portal Pay Act (29 U.S.C. 260) provides:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

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